

Citation: *C. V. v. Minister of Employment and Social Development*, 2015 SSTAD 1012

Appeal No. AD-15-55

BETWEEN:

C. V.

Applicant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

**SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Leave to Appeal Decision**

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: August 26, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division dated October 27, 2014. The General Division determined that the Applicant had abandoned her appeal from a reconsideration decision of the Respondent and thereby closed the file. The Applicant denies that she abandoned her appeal and alleges that she held the intention of pursuing her appeal throughout. To succeed on this leave application, I must be satisfied that the appeal has a reasonable chance of success.

ISSUE

[2] Does the appeal have a reasonable chance of success?

BACKGROUND

[3] The Applicant applied for a disability pension under the *Canada Pension Plan* in March 2010. The Respondent denied the application at both the initial and reconsideration levels. On April 12, 2011, the Applicant appealed the reconsideration decision to the Office of the Commissioner of Review Tribunals (“OCRT”).

[4] Under section 257 of the *Jobs, Growth and Long-Term Prosperity Act*, any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the OCRT transferred the Appellant’s appeal of the reconsideration decision to the Social Security Tribunal.

[5] On December 4, 2013, the Social Security Tribunal wrote to the Applicant advising that it had received a signed Notice of Readiness from one of the parties to the appeal. The Social Security Tribunal also wrote that after it had received a signed Notice of Readiness from each of the parties, or at the end of 365 days from the date of the filing of the notice of appeal, the parties would no longer be permitted to file any additional documents or

submissions, and that the Social Security Tribunal would then make a decision or send a notice of hearing to the parties. This letter was returned to the Social Security Tribunal on December 20, 2013, marked “return to sender”. No forwarding address was provided for the Applicant.

[6] In February 2014, the Social Security Tribunal attempted to contact the Applicant at the telephone number which appeared on her application for a disability pension. Notes on the hearing file indicate that the telephone number was “not assigned to a device”.

[7] On April 22, 2014, the Social Security Tribunal wrote to the Applicant, at the same address it had previously written to her. The Social Security Tribunal advised that the appeal was considered ready to proceed and the Social Security Tribunal would soon be assigning the appeal to a Tribunal Member. The Social Security Tribunal advised the Applicant that if she wished to file any additional documents or written submissions that had not already been sent, she was invited to file these “without delay”. This letter was marked “undeliverable” to the Applicant and was returned to the Social Security Tribunal.

[8] On July 29, 2014, the Social Security Tribunal wrote to the parties, advising that the General Division Member intended to proceed by way of videoconference. The Social Security Tribunal advised the parties that they had until September 2, 2014 to file any additional documents or submissions, and until October 7, 2014, to respond to any documents. This letter was marked “undeliverable” to the Applicant and was returned to the Social Security Tribunal.

[9] The General Division rendered its decision on October 27, 2014. The Social Security Tribunal mailed a copy of the decision to the parties but the decision was undeliverable to the Applicant and was returned to the Social Security Tribunal.

[10] On January 16, 2015, the Applicant contacted the Social Security Tribunal to enquire into the status of her appeal before the General Division. A client services officer advised the Applicant that the Social Security Tribunal had made numerous unsuccessful attempts to reach her by telephone, but the telephone number which she had provided was

no longer in service. The officer also advised the Applicant that mail addressed to her had been returned to the Social Security Tribunal marked as “moved” or “undeliverable”.

[11] The Applicant responded that she had, at some point, visited a government office in X and provided it with her change of address, as she had been alerted by the government that her personal information had been compromised. The Applicant believed that once she provided a change of address to the government office, she had fulfilled her obligations to provide current contact information. The client services officer advised her that the Social Security Tribunal did not have her current contact information, so the Applicant provided it to her.

[12] The client services officer of the Social Security Tribunal advised the Applicant that a hearing date had been set and that as the General Division considered her appeal abandoned, the file had been closed. The Applicant responded that she had called the office many times, seeking an update as to the status of her appeal.

[13] The Applicant contacted the Social Security Tribunal by telephone again on January 21, 2015. A second client service officer advised her that the matter was considered closed before the General Division and that as such, she would need to seek leave to appeal the decision of the General Division to the Appeal Division. The officer advised her that she had 90 days from the time that the decision of the General Division had been communicated to her to file an application requesting leave to appeal. The Applicant appealed to the officer, as she thought that providing a change of address to Service Canada was all that had been required of her.

[14] It is unclear if the Applicant ever received a copy of the decision of the General Division and if so, when she might have received it. The Applicant attempted to file an application requesting leave to appeal with the Leave Division on February 12, 2015, by sending the application as an e-mail attachment to the Social Security Tribunal. She managed to attach the application to her e-mail of February 16, 2015 to the Social Security Tribunal. The Applicant did not sign the application however.

[15] On February 18, 2015, the Social Security Tribunal wrote to the Applicant, advising that her application for leave to appeal was incomplete, as she had not stated the grounds for the application, nor set out the statement of facts that had been presented to the General Division. The Social Security Tribunal reminded the Applicant that she was required to file the application for leave to appeal within 90 days after the decision of the General Division had been communicated to her.

[16] The Social Security Tribunal also advised the Applicant that if she wished to proceed but did not provide the requested information within 90 days after the decision of the General Division had been communicated to her, she would need to request an extension of time to file the completed application for leave to appeal. She would need to address the following four factors:

- (a) Whether there was a continued intention to pursue the application;
- (b) Whether the matter disclosed an arguable case;
- (c) Whether there was a reasonable explanation for the delay; and
- (d) Whether there would be prejudice to the other parties in extending the deadline.

[17] On February 25, 2015, the Applicant requested an application form to enable her to file an application requesting leave to appeal. She also explained that when she attended the government office in X, she understood that if she provided a change of address, that this would be communicated to all government departments. She again denied that she had abandoned her appeal before the General Division.

[18] On February 26, 2015, the Social Security Tribunal sent an e-mail to the Applicant advising that it considered her leave application to be incomplete. The Social Security Tribunal attached a copy of its letter dated February 18, 2015.

[19] On May 4, 2015, the Applicant responded to the e-mail of February 26, 2015 from the Social Security Tribunal. The Applicant requested help completing the application form for leave to appeal. She explained that she was appealing the decision of the General

Division, as a hearing had never been set and because she had been advised that she had abandoned her appeal.

[20] The Applicant e-mailed the Social Security Tribunal again on May 12, 2015. She reiterated that she had not abandoned her appeal. She again pleaded for assistance in completing the application form for leave to appeal. She again noted that she had attended at a government office in X and had provided a change of address. She advised that she had been “calling cpp (*sic*) for years waiting for a date” but that the only response she ever received was that her personal information had been compromised.

[21] On May 13, 2015, the Social Security Tribunal responded by e-mail to the Applicant. The officer advised that the Social Security Tribunal had again attempted to contact her by telephone, but she was unavailable and there was no opportunity to leave a voice mail message. The officer referred the Applicant to subsection 58(1) of the *Department of Employment and Social Development Act (DESDA)* for assistance in completing her application for leave to appeal.

[22] On May 15, 2015, the Applicant e-mailed the Social Security Tribunal advising that she was not in a financial position to contact it by telephone (although there is a toll- free telephone number available). The Applicant did not provide any new information she had not already previously given.

[23] On May 20, 2015, the Social Security Tribunal contacted the Applicant, who advised that she had provided the missing information.

[24] On June 24, 2015, the Social Security Tribunal wrote to the Applicant, confirming that it had now received her complete application for leave to appeal.

[25] On July 6, 2015, the Social Security Tribunal sent a letter to the Applicant with the following questions and requests:

1. Please provide a copy of the letter which says that your “private information had been compromised”. When did you receive this letter? From whom did you receive this letter? Which address was this letter sent – to your X or X address?

2. When did you move from X to X? What evidence do you have to prove that you moved? Please provide copies of any evidence (such as any hydro or gas bills) to show when you moved.
3. You advise that you went to “Government Social Services” and notified them of your change of address. When did you attend at “Government Social Services”? Do you have any evidence or proof that you completed a change of address there? i.e. were you provided with a copy of the change of address?
4. Similarly, you advise that you contacted CPP on several occasions. How did you contact CPP? What telephone number did you contact? On what date(s) did you contact CPP? With whom did you speak on each occasion?
5. In November 2011, the Office of the Commissioner of Review Tribunals had requested that you provide updated telephone. The OCRT also advised you that if it did not hear from you within 30 days, that it would conclude that you had abandoned your appeal. In light of this information from the OCRT, did you take any steps at all to notify the OCRT or the Social Security Tribunal of any changes of contact information after you moved from X to X? If so, when did you contact the OCRT or Social Security Tribunal and how did you contact the OCRT or Social Security Tribunal?
6. When did you receive a copy of the decision of the General Division? How did you receive a copy of this decision?

[26] The Social Security Tribunal requested the additional information in writing by July 20, 2015. The Social Security Tribunal advised that if it did not receive the response within the specified time, the Appeal Division Member could make a decision based on the information already on file.

[27] The Social Security Tribunal also invited the Respondent to provide submissions in regards to any of the questions, if it chose to do so.

[28] The Social Security Tribunal extended the timeframe for responding to August 17, 2015, to accommodate a request from the Applicant, as she was on holidays. The Applicant provided a response on August 11, 2015. She explained that because she moved several times between 2012 and 2014, she did not retain copies of many records, including those requested by the Social Security Tribunal. She moved from X to X on October 1, 2014 and provided a gas bill which purportedly shows that she paid a security deposit for the X

address; the bill unfortunately was not legible. The Applicant also provided a copy of a letter dated December 2012 from the Department of Human Resources and Development Canada, addressed to her former address in X, confirming that some of her personal information, which was contained on an electronic storage device, had been misplaced. The letter however does not suggest that she attend at a Service Canada Centre in regards to the incident of the loss of personal information. The Applicant also advised that she “did not call CPP”, as she had been advised in past that she had to wait for a date to be scheduled. She alleges that she had a worker named Peter with whom she could email for any status updates.

SUBMISSIONS

[29] The Applicant alleges that she had provided her change of address to a government office in X and submits that she never abandoned her appeal before the General Division.

[30] The Respondent has not filed any submissions.

THE LAW

[31] Some arguable ground upon which the proposed appeal might succeed is required for leave to be granted: *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC). The Federal Court of Appeal has held that an arguable case at law is akin to determining whether legally an applicant has a reasonable chance of success: *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

[32] Subsection 58(1) of the DESDA sets out the grounds of appeal as being limited to the following:

- (a) The General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

- (c) The General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

[33] I need to be satisfied that the reasons for appeal fall within any of the grounds of appeal and that the appeal has a reasonable chance of success, before leave can be granted.

ANALYSIS

(a) Late leave application

[34] The decision of the General Division was rendered on October 27, 2014, but the Applicant did not learn of the decision until at least January 16, 2015, when she contacted the Social Security Tribunal to enquire into the status of the appeal. She filed an application requesting leave to appeal in mid-February 2015. She set out the grounds in the application. Despite this, the Social Security Tribunal wrote to her on February 18, 2015, advising her that the application was incomplete, in that she needed to provide the grounds for the application, as well as the statement of facts that were presented to the General Division and which she would be relying upon in the leave application. It is unclear whether there were any additional facts which the Applicant may have presented to the General Division which she would be relying upon in the leave application.

[35] As the Applicant filed a leave application in mid-February 2015, I do not consider the application to have been filed late, as the decision had not been communicated to her until at least January 16, 2015. This was well within the timeframe permitted for filing.

(b) Reasonable chance of success

[36] It would have bolstered the Applicant's submissions had she provided some documentary evidence that she had indeed notified the government office in X of her change of address at some point. For instance, she could have produced the letter from the government, notifying her that her personal information had been compromised. While it would not have proven that she had visited the government office, it would have supported her claim that there was a basis for her to attend at a government office.

[37] Section 6 of the *Social Security Tribunal Regulations* requires a party to file a notice of change of contact information without delay with the Social Security Tribunal. The Applicant failed to comply with section 6 of the *Regulations*.

[38] The General Division found that as the Applicant had failed to comply with the requirements of section 6 of the *Regulations*, that she had abandoned her appeal. The General Division relied on subsection 3(2) of the *SST Regulations* in proceeding to dispose of the appeal.

[39] There is supporting jurisprudence for the decision of the General Division. In *X (Re)*, 2011 CanLII 94644 (CA IRB), the Immigration and Refugee Board (IRB) determined that the claimant herself was responsible for the defaults. The IRB did not accept that the Refugee Protection Division had failed to observe a principle of natural justice or committed a breach of it, and therefore, was unprepared to re-open the claim.

[40] I note that there is conflicting jurisprudence. In *Bamrah v. Canada (Minister of Employment and Immigration of Canada)*, 1989 CanLII 163 (FCA), the applicant there did not receive three successive notices of hearings from the Immigration Appeal Board because he was no longer residing at the address where they had been sent. He had not notified the Board or his counsel of his change of address, but had informed the Ministère des affaires culturelles du Québec, the Department of Employment and Immigration of Canada and the post office of his change of address. The majority members of the Board were unimpressed and determined that the applicant's negligence alone was the reason he had not been informed of the hearings. The Board members found that there was no justification to reopen the hearing.

[41] Marceau, J. held that it was unconscionable to deny the interested party the opportunity to be heard. He wrote:

With respect, I would dispute the legal merit of this reaction by the majority members. In an area like the one in question, in regard to a proceeding as important as this, I think it is unconscionable to deny the interested party the opportunity to be heard, even belatedly, as a punishment for his failure to remain in contact with the Board. The principle of fundamental justice expressed by the maxim *audi alteram partem* cannot be so readily ignored. It is not only the applicant who is involved here

but also the Board, which should not resign itself to making such a vital decision without being fully informed unless, for major reasons of an administrative or other nature, it is not possible, in the exceptional circumstances of the case, for it to do otherwise. There is nothing to suggest that the applicant was avoiding the Board's notices nor can it be said that his actions might have indicated an implied waiver of his right to a hearing, or even a mere indifference about exercising that right. In my opinion, the panel could not, in these circumstances, deny the applicant the right to exercise it.

[42] The Federal Court of Appeal set aside the Board's decision denying the claim and referred the matter back to it, stating that, in the circumstances, the Board could not refuse to reopen the applicant's hearing on his application for redetermination of his refugee claim.

[43] Here, the Applicant clearly was non-compliant in having failed to file a notice of change of contact information with the Social Security Tribunal. However, can it be said that she necessarily abandoned her appeal as a result of her non-compliance? Overall, I am satisfied that the issues herein raise an arguable case and that the appeal has a reasonable chance of success.

CONCLUSION

[44] The application for leave is granted.

[45] This decision granting leave to appeal in no way presumes the result of the appeal on the merits of the case.

Janet Lew

Member, Appeal Division